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ABSTRACT

This unit is designed to encourage the students to discover the relevancy of American democratic ideals to their daily lives. It concentrates on the meaning of the fundamental freedoms expressed in the First Amendment: freedom of speech, press, assembly, petition, and religion. In addition, the student should receive some concrete insights into the nature of our federal system, the role of the Constitution, and the functioning of the judiciary. Through the use of actual cases as documented in court decisions and the press, it is hoped that the student will develop an understanding of the concept of responsible freedom, and limitation of individual freedom when its exercise conflicts with the freedom of others. Inherent in this concept are the ideals of democratic society: respect for the individual, equality before the law, protection of the general welfare, promotion of law and order. The unit is designed primarily for the non-college-bound students, i.e., those high school students described as slow learners, under-achievers, culturally deprived, disadvantaged, or alienated. (See SO 000 161 for a listing of related documents.) (SBE)

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## TEACHER'S MANUAL

# LIBERTY OR LICENSE

# THE FIRST AMENDMENT IN ACTION

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This material has been produced
by the
Committee on the Study of History, Amherst, Massachusetts
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SO 000 166

## NOTE TO THE PUBLIC DOMAIN EDITION

This unit was prepared by the Committee on the Study of History, Amherst College, under contract with the United States Office of Education. It is one of a number of units prepared by the Amherst Project, and was designed to be used either in series with other units from the Project or independently, in conjunction with other materials. While the units were geared initially for college-preparatory students at the high school level, experiments with them by the Amherst Project suggest the adaptability of many of them, either wholly or in part, for a considerable range of age and ability levels, as well as in a number of different kinds of courses.

The units have been used experimentally in selected schools throughout the country, in a wide range of teaching/learning situations. The results of those experiments will be incorporated in the Final Report of the Project on Cooperative Research grant H-168, which will be distributed through ERIC.

Except in one respect, the unit reproduced here is the same as the experimental unit prepared and tried out by the Project. The single exception is the removal of excerpted articles which originally appeared elsewhere and are under copyright. While the Project received special permission from authors and publishers to use these materials in its experimental edition, the original copyright remains in force, and the Project cannot put such materials in the public domain. They have been replaced in the present edition by bracketed summaries, and full bibliographical references have been included in order that the reader may find the material in the original.

This unit was initially prepared in the summer of 1966.

This unit is designed to encourage the students to discover that the ideals of American democracy which may seem abstract and remote when seen in the pages of the text-book have a real relevancy for them in their daily lives. Far from being mere abstractions these ideals are as real as the laws of our country and the police who enforce them; as real as the protests and demonstrations by which people struggle for these ideals, and the riots and bloodshed that sometimes result; as real as the wars fought to preserve them, and the lives lost in those wars.

Specifically, the unit concentrates on the meaning of the fundamental freedoms expressed in the First Amendment: freedom of speech, press, assembly, petition and religion. In addition the student should receive some concrete insights into the nature of our federal system, the role of the Constitution, and the functioning of the judiciary--in short, how the government which runs their country operates and what this means for them.

This unit helps the students make these discoveries by focusing on real events related to the freedoms listed in the First Amendment. Through a study of these realistic materials, it is hoped that the student will develop an appreciation for the concept of responsible freedom and the process by which the ideal of maximum freedom for each individual is limited when the exercise of that freedom conflicts with the freedom of another individual or group.

A major aspect of freedom is the guarantee of individual and minority rights. Perhaps in no other place does the basic democratic ideal of majority rule which respects the rights of the minority find better expression than in the First Amendment. Inherent in this study of the concept of responsible freedom are the ideals of democratic society: respect for the individual, equality before the law, protection of the general welfare, promotion of law and order.

It is hoped that working with this living material will assist the student in developing his skill in critical thinking and expression. It may foster an attitude of greater open-mindedness and tolerance for opposing viewpoints. In addition, in studying the thinking of some of the best minds in the nation, the student may develop a respect and appreciation that will elevate his value judgments.

This unit is designed primarily for the non-college preparatory student. This type of student has been described as a "slow-learner", as an "under-achiever", as "culturally deprived," as "disadvantaged," and as "alienated." All of these terms describe the student for whom this material is intended, but it is important to remember that all of the students do not meet all of the descriptions. A student who is "slow" is not an under-achiever. A student who is "disadvantaged" is not necessarily "slow." Similarly, one who is "culturally deprived" need not necessarily be either "slow" or an "under-achiever."

It is important for the teacher to remember that even in a graded class or one that follows a "track system" there will be substantial differences in ability, background, and motivation. With this in mind, the unit has been designed to provide sufficient variety of materials for the teacher to differentiate among the various categories of students.

Some of the readings are fairly brief, while others are substantial in length. Some make their point clearly and openly while others contain a variety of ideas requiring analysis and evaluation. Thus the unit should be used with care. It is not expected by any means that every student will be able to cope with everything contained in this unit. To assist the student a number of devices have been incorporated in the student manual. In the first sections emphasis has been added by underlining significant passages. This device has been employed to assist the student in handling material of a type with which he has had little experience. In a number of cases the opinions of the Supreme Court have been supplemented by articles from national magazines which summarize and highlight the key points. In a few cases, the periodical coverage replaces the Court opinions entirely. Despite this, some of the secondary goals and concepts may be beyond the ability of the slowest students, but the basic theme as detailed in the introduction should be within the grasp of all.

With these considerations in mind, the teacher should be prepared to differentiate, edit, eliminate or add material for some students. No one can know a class as well as the teacher of that class. With this in mind, we remind the teacher that all of the material contained in the teacher's manual is merely suggestion. He will have to make his own decisions as to its applicability to his particular classes. In general the unit has been structured to begin with the section on Freedom of Speech, Assembly, and Petition, but should it serve the need of the class the teacher should feel free to rearrange the order in which the unit is presented.

The following brief attitude check is included as a device to enable the teacher to ascertain the feeling of his students at or near the beginning of the unit. These questions, in a simplified form, represent the issues around which much of the unit revolves. It may well be of value to know the feelings and conceptions or misconceptions of the students. The teacher may want to use this attitude check again at the end of the unit.

The students should be told that there are no right answers and that they should give their own opinions.

| | | Agree | Disagree | Not Sure |
|---|---|---|---|---|
| 1, | People should be allowed to criticize the government. | ____ | ____ | ____ |
| 2. | Communists should be allowed to speak freely. | ____ | ____ | ____ |
| 3. | Only well-known groups should be allowed to hold meetings. | ____ | ____ | ____ |
| 4. | Newspapers should just print facts, not opinions. | ____ | ____ | ____ |
| 5. | The police should decide what groups should hold public meetings. | ____ | ____ | ____ |
| 6. | Movies and television should be censored to make sure they are "clean." | ____ | ____ | ____ |
| 7. | A person who admits to being a communist should be allowed to distribute literature. | ____ | ____ | ____ |
| 8. | A person who is against religion should be allowed to publish and speak his opinions. | ____ | ____ | ____ |
| 9. | In time of war or serious trouble, the government should have greater control over what is said or written. | ____ | ____ | ____ |
| 10. | People should not be allowed to picket the White House. | ____ | ____ | ____ |
| 11. | Demonstrations against United States foreign policy should be prohibited. | ____ | ____ | ____ |
| 12. | The government should treat small and unusual religious groups in the same manner as it treats the well-known. | ____ | ____ | ____ |

| | Agree | Disagree | Not Sure |
|---|---|---|---|
| 13. A person should be punished for what he does not for what he says. | _____ | ________ | ________ |
| 14. A newspaper that attacks a famous person should not be punished if it only states its opinion. | _____ | ________ | ________ |
| 15. Books sold to children should be censored, but not those sold to adults. | _____ | ________ | ________ |
| 16. An independent candidate for office should not hold street rallies the way a party candidate can. | _____ | ________ | ________ |
| 17. The government should make sure that radio and television stations are neutral in politics. | _____ | ________ | ________ |
| 18. The government should be prohibited from helping religions. | _____ | ________ | ________ |
| 19. The government should protect peaceful demonstrations, even those against what the government is doing. | _____ | ________ | ________ |
| 20. The Bible should be read in the public schools. | _____ | ________ | ________ |

## FREEDOM OF SPEECH, ASSEMBLY, AND PETITION

### An Incident

The brief episode which introduces the section describes a blatant violation of free speech. It is included here to have students identify the issue and identify with the topic, and to have them take a stand on the issue.

Students might be asked the following questions for discussion:

1. What is the real issue?

2. What are your feelings or beliefs about the real issue? Why?

3. How do your beliefs about the real issue relate to the events described?

4. If you were the principal at this school and the student involved protested his punishment, what would you do? Why?

Following the above line of questions, it would be hoped that the students would articulate that the issue involved is freedom of speech. It is also hoped that students would state that they believe that people should have freedom of speech. The third question is suggested to begin the practice of making specific reference to the materials under consideration. The fourth question prepares them for the role of the Supreme Court in the cases immediately following.

In any case it is hoped that the students will identify with the student in the episode and take a strong stand favoring free speech.

### Speech That Violates Public Peace

This portion of the unit introduces the idea of limits on free speech and the difficulty of determining those limits. It presents the concept of "balance," that one right must not infringe on another. It emphasizes the reasons for and the importance of judicial dissent and illustrates the role of the Supreme Court as an interpreter rather than as a maker of law.

The introduction presents a simplified but accurate summary of an actual incident that resulted in a case which was appealed to the Supreme Court, Feiner v. New York. In its decision in the case the Court established the rule that freedom of speech could not be used as a cloak to incitement of riot. This case gives the students an opportunity to see some of the complexity surrounding the First Amendment and the historic reasons for some restraint of what on the surface seems to be an absolute right. It also provides an opportunity for students to develop skills in the use of primary source material and in exercising independent judgment. In this and other court decisions that follow throughout the unit, the opinions have been excerpted to present the essence of the case and the reasoning of the judges and to eliminate side issues and legal terminology.

In addition, study of this case provides an opportunity for students to examine the federal system. Feiner, convicted of violating a New York statute, appealed to the Supreme Court on the grounds that the statute was in contradiction to the First Amendment guarantee of free speech. The First Amendment has been made applicable to the states by the Fourteenth Amendment which says that no state may deprive a person of life, liberty or property without due process of law.

Suggested Procedures:

1. Give the students an opportunity to read the description of the incident and to formulate answers to the personalized questions contained in the student manual.

2. To clarify the issue before reading the opinions, the students could be asked "What do you think is the main issue on which the Supreme Court decided the case? Why?" This question should emphasize that the Supreme Court is not interested in whether or not Feiner is guilty of disorderly conduct but in whether or not the statute under which he was convicted conflicts with the First Amendment.

3. The relationship between the Supreme Court and local government and some of the problems inherent in a federal form of government can be brought out by asking "How could Feiner appeal to a Federal Court if he was accused of breaking a New York State law?"

4. Give the students an opportunity to study the opinions. On this first case it is suggested that this be done in class so the teacher will be available to help with any difficulties which may arise. Notice that the selection does not identify which Justice is speaking for the Court and which is in dissent.

5. Topics for class discussion:

a) Which opinion do you think speaks for the majority? Why?

b) Which opinion do you agree with? Why?

c) If you believe Feiner was guilty, how would that decision affect other speakers? How might it affect you?

d) If you feel he was innocent, what should the police have done? What if there was a riot?

After discussing these topics the students should realize that decisions of the Supreme Court establish precedents which will be observed by Federal Courts throughout the nation and that, if the New York statute is upheld, it would encourage other municipalities to enact similar legislation.

In this case the majority held that Feiner was guilty. The Court thus established the guideline that freedom of speech could not be used to incite riot, especially on a public street.

## Speech That Creates Public Anger

The case described in this reading bears many resemblances to the Feiner case. Yet the Supreme Court could see enough essential difference to grant certiorari and receive the case on appeal. In this case, the majority held that stirring unrest and controversy was a proper function of free speech and that the disturbance had not yet reached such proportions as to constitute a riot. The fact that this was an indoor meeting and therefore not likely to involve the casual passerby seems to have been a crucial point. This case was included to give the students further experience in studying decisions and in discovering how difficult it is to render a decision that will cover all future events which will of necessity differ in detail and degree.

It is expected that the students will find Terminiello a much more hateful character than Feiner and that they will display righteous prejudice against him. The questions that follow the presentation of the case yet precede the opinion and dissent are designed to give the students an opportunity to articulate their feelings and prejudices.

Suggested Procedures:

1. The introduction and descriptions of the case should be given as an assignment. The students should be asked to answer the questions which follow the description of the case. These questions should help clarify the student's thinking and provide motivation for study of the Court's opinions.

2. After the decisions have been read, the following questions could form the basis of a class discussion:

a) Why was Terminiello not guilty if Feiner was?

b) Does the fact that this was an indoor meeting make any difference?

c) What did Jackson mean in his discussion of the importance of the manner and tone of a speaker? Can a person's gestures and way of speaking change his meaning? What does this mean for the law?

d) Do you think it is possible that the beliefs of the speaker could have influenced the Court? Do you think the fact that the crowd outside may have been at least partly procommunist influenced the Court? Should it?

e) What does the fact that the Court divided 5-4 suggest?

It is expected that many of the students will have difficulty in accepting the acquittal of the defendant Terminiello, especially in view of Feiner's conviction. The students can be given an opportunity to examine this apparent contradiction and reversal on the part of the Court which may aid them in seeing some of the subtlety and complexity with which the Court must grapple. It might be helpful to remind them that after nearly two centuries the Court is still grappling with the need to define exactly the meaning of the First Amendment.

To give the students a further opportunity to comprehend the basic conflict, three brief quotations from eminent jurists are included at the end of the reading. The students could be asked to read these as an assignment and to write a brief paper:

1) I agree with paragraph(s) _____ because ..........

2) I disagree with paragraph(s)_______ because..........

Students might also be asked to prepare a list of words and phrases whose meaning can be altered by the expression, tone or manner of the speaker. These phrases demonstrated in class should prove revealing to many of the pupils and re-enforce the need for caution in making quick decisions. Consider, for example, the common classroom expression, "the period is almost over."

## Marching Through Dixie--First Amendment Style

The Edwards Case was included to help students see the working of precedent in Court deliberations. Notice that in reversing the conviction, the Court not only cited the Terminiello case in which the defendant was similarly acquitted, but also differentiated between this case and the Feiner case where the conviction was upheld. This reading coupled with earlier ones should help to clarify for the students the manner in which the Court makes distinctions which become incorporated into the "law of the land."

The students will probably empathize with the students in the case. They may also be sympathetic to the cause. It is therefore suggested that students be encouraged to discuss the fact that the applicability of the guarantees of the First Amendment are not determined by the popularity of the speaker or the issues under discussion.

The following underlying themes that can be woven into class discussions: the interdependance of freedoms, the close relationship between free speech and free assembly, the doctrine that this is a nation of law, not of men; the principle that the cause does not matter as much as the equitable application of the law; and understanding the role played by precedent despite the fact that each court case is separate and distinct.

Suggested Procedures:

1. At this point a worthwhile discussion as to the nature of a majority could be developed from the fact that a majority of the community was opposed to the demonstration. Such a discussion should touch upon the limitations which minority rights and the rights of the individual place on the exercise of majority rule.

2. The class should decide what basic issues were involved in the Edwards case. Note that, in addition to freedom of speech, freedom of assembly and the right to petition for redress of grievances are raised. Should a song be included under the guarantees of free speech? A picket sign?

3. How would this decision affect the situation in South Carolina? In the rest of the country?

4. How do you think the Supreme Court would have ruled if this had been a demonstration against civil rights?

## The First Amendment--200,000 Times A Day

This selection is included to give the students a further opportunity for seeing the First Amendment freedoms in action. It also gives the students an opportunity to see the concept of "equality before the law" in operation and to realize that the law would measure this greatest single demonstration with the same yardstick as the much smaller one described in the previous selection. Indeed this spectacular event involves many of the same constitutional questions as those raised by the Terminiello or Feiner incidents. The students may well be caught up in the drama and spectacle of the event and perhaps be influenced by the host of celebrities that were present.

Suggested Procedures:

1. Following the reading these questions might serve as a basis for discussion:

a) Why was the March called? Are there other ways in which the same purposes can be achieved?

b) To whom was the March directed? Why did the March attract so much attention? Was this attention wanted?

c) Why was Lewis persuaded to tone down his remarks? What might have happened if he had delivered his speech as originally planned?

d) What chances did the leaders of the March take?

e) What were the immediate results of the March? What were the possible long-range results?

2. Have the students re-read the selection looking for "loaded" words and phrases. Have them see if they can locate any editorializing or opinion. See if this in any way changes their opinion of the march.

3. Arrange a debate on the proposition: "Resolved, that this class would support and participate in another such march, if called."

4. Ask the class to consider what effect, if any, there would have been on the March if the Edwards case had been decided the other way.

## The First Amendment--Southern Style

As in the case of the Washington March, the March on Selma provides a dramatic example of freedom of speech, of assembly, and of petition. This selection thus emphasizes and reenforces the points made earlier in the unit. In addition, because the Selma March took place in the state of Alabama in a hostile environment, the elements of danger and personal commitment tend to be stronger. Most students will probably empathize with the marchers and sense the frustration and determination that this group experienced in this undertaking. At the same time it is hoped that the class will be able to see the march as an expression of freedoms guaranteed by the First Amendment.

In addition it is hoped that the class will develop an awareness for such a basic consideration as the concept that "free men are responsible men," that they have an obligation to work within the law and to use legal means in their struggle for changes and improvements.

Suggested Procedures:

The questions which precede the reading of the report on the Selma March are designed to bring out the student's feelings both as to the March and as to how the student would react to the larger question of protecting individual rights. After these reactions have been discussed, the following questions are suggested for further consideration:

1. As far as the Bill of Rights is concerned, are there any differences between a March held in Washington, D.C. and one held in Alabama?

2. Since the State government was against the purpose of the March, why was it held in the first place?

3. Since the March was held in Alabama, why were United States Marshals and federal troops present? How does their presence fit into our federal form of Government?

4. If the murderers of Mrs. Liuzzo were not prosecuted by the state, could the federal government act?

5. What are the implications of the remarks "An inauguration crowd may look like that in a few years" and "That's quite a crowd?"

## Free Speech--And How!

The selection is an obvious collection of distortions, half-truth and innuendos. Most students will be able to see the motives of the Congressman, and this will provide an excellent opportunity for them to see how a propagandist can make his points without being caught in a specific lie. This use of free speech should dramatize for the students some of the reasons for the arguments against considering as absolute the rights guaranteed by the First Amendment. This selection raises the additional point of the constitutional guarantee of immunity which is extended to Congressmen.

Suggested Questions for Discussion:

1. Why do you think the Constitution makes Congressmen immune from responsibility for their statements? Do you think this is a good idea? Why? Why not?

2. If someone else had made Dickinson's remarks, or if he repeated them outside Congress, could anything be done to him?

3. What would you have done if you were a member of Congress and were present when Dickinson spoke?

4. Assuming that Dickinson knew that he would be attacked in the press for his statements, why do you think he made those statements? To whom was he speaking?

## THE FIRST AMENDMENT AND NATIONAL SECURITY

### Don't Shout "Fire!"

The Schenck case, a land-mark decision, introduces the "clear and present danger" doctrine which is attributed primarily to Holmes but supported by his colleague Brandeis. This presents a major and controversial limitation to the First Amendment. This doctrine cited in a number of subsequent decisions, provided a legal basis for later legislation such as the Smith Act which made it a crime to attempt to overthrow the government by force and violence. It is clear that this decision could serve as a weapon against subversion and open rebellion. The difficulty, as usual, lies in applying general doctrines to specific cases. There are endless degrees of advocay ranging from open action to theoretical conjecture.

Holmes himself pointed out that in reaching his decision he had placed considerable weight on the fact that the United States was at war. The Court might well have reached a different decision had the case arisen in peace time. Nevertheless, the Schenck case set a powerful precedent. This raises some basic considerations that could serve as the basis for fruitful class discussion. These include the idea that majority actions are often temporary in nature, but the results are often with us after the majority has melted away, that the action of the Court in limiting the freedom of one limits the freedom of all, and that there is no appeal from the Supreme Court except by amending the Constitution itself.

Suggested Procedures:

The following questions raised by this case make good points for class discussion or assignments:

1. How do we decide if there is a clear and present danger?

2. If one person says he favors a Communist revolution in America, does the doctrine apply? If 10 say it? Or 100? Or 1000?

3. If official Communist teachings advocate revolution, does this mean that every person who joins the Communist party is necessarily a subversive? What about people who favor Communism but are not members of the party?

4. How would this doctrine effect a Nazi or Fascist type organization?

5. Should this doctrine, if applied, be used differently in time of war than in time of peace? In time of national

emergency?

6. Should favoring revolution in itself be a crime or should only actually attempting revolution be so considered?

There will no doubt be wide disagreement among students on these questions. This should be encouraged as it lays the basis for consideration of future events, many of which have aroused wide controversy in the Court and in the nation. It should be stressed that there are no "right" answers to many of these questions.

## Not a Blank Check

The Schenck case established the principle of "clear and present danger." In the Gitlow case we see a defendant acting in the same way that Schenck did. By his own writings he is admittedly working for the overthrow of the United States government by force and violence. The difference between the two cases makes a vital point. Schenck's activities occurred during wartime, Gitlow's when the nation was at peace. It was difficult to see how Gitlow's small group could pose a realistic threat to the United States. We are therefore, faced with the need of determining how real and how imminent a threat to the government must be before the Supreme Court, using the "clear and present danger" doctrine, may uphold the constitutionality of a law which prohibits such activities. In short, did the Communist party pose a sufficient threat to the United States for it to be restrained? The majority thought so. Holmes could not see the urgency and dissented. Thus we have another example of "balancing."

Suggested Questions for Discussion:

1. How do you know when a group is strong enough to present a "clear and present danger?"

2. Referring to the Manifesto, Holmes said ". . . it had no chance of starting a conflagration." Suppose if he had said ". . . it had slight chance of starting a conflagration." Would this change affect the decision?

3. The majority opinion stated ". . . the freedom of speech and of the press . . . does not confer an absolute right to speak or publish, without responsibility." Do you agree with this opinion? What does "responsibility" mean?

4. Should the fact that Gitlow acted in peace time while Schenck was convicted during World War I make any difference?

5. Could the law under which Gitlow was convicted be used in other types of activities? A race rioter? A demonstrator against United States foreign policy?

## A Freedom Is A Freedom Is a Freedom

This selection is a substantial one. Although it has been heavily excerpted, both the length and the vocabulary may make it difficult for some of the students. The essential point, however, is a vital one and should be within the understanding of a slow student. Justice Black contends, and his long tenure on the Bench attests to his conviction, that the Bill of Rights freedoms are just that--absolute freedoms which the government may not restrict. His viewpoint, therefore, contrasts with the bulk of the material that we have been reading which is mainly concerned with whether and how the freedoms should be limited.

Through a fictitious case he attempts to show the dangers of "balancing." He contrasts this with the lesser dangers of allowing maximum freedom for the individual citizen. The simplicity of his arguments are attractive and should prove so to the student. While the students would be traveling in distinguished company if they accepted his thesis, they should be compelled to put it to the test.

Suggested Procedures:

Following are brief descriptions of five incidents in which the citizen, should he be taken to court, could plead the First Amendment. In relation to each situation the students could be asked to answer the following three questions:

a) How would a judge who believes in "balancing" decide?
b) How would a judge who believes in "absolutes" decide?
c) How would you decide? Why?

1. A person reads Lenin's books which teach violent revolution and says, "Lenin is right."

2. A bookseller sells Communist books that teach violent overthrow of the government.

3. A person writes a leaflet that states, "The only way to convince the mayor to get busy on slum clearance is to set fire to the slums."

4. A street corner speaker says, "The mayor and the whole gang in city hall are just a pack of crooks and racketeers. They'll let you get away with anything if you pay enough."

5. A union leader writes in the union paper, "We are going out on strike. Even if the Courts order us back to work we will stay out. They can't put us all in jail and if they could who would do the work?"

## It's Clear and It's Present

The Dennis case which resulted in the conviction of the top Communists in the United States, had been the center of a Constitutional controversy. The Smith Act, under which the Communists were prosecuted, makes it a crime to teach or to advocate violent overthrow of the government, whether or not such overthrow has actually been attempted. Since teaching and advocacy of necessity involve freedom of speech and of the press, a Constitutional question arises. While all of the Justices agreed that Congress has the authority to protect the government, they did not agree that the actions of the Communist Party justified prosecution. The dissenters viewed the precedent set in the Dennis case as establishing a dangerous pattern which could possibly lead to the suppression of any unpopular idea. On the other hand, the majority considered that this danger was outweighed by the necessity of defending the government against a dedicated enemy, holding that it would be foolhardy to allow the Communist Party to use the First Amendment as a cloak under which it could build strength until it was ready to foment revolution.

Because of the significance of this decision and the complexity of the issue most of the justices elected to write individual opinions. Presented at some length are portions of the majority opinion written by Chief Justice Vinson and Justice Douglas' dissent. To assist any student having trouble with these readings, two briefer articles from national magazines have been appended.

Suggested Procedures:

1. Questions for Discussion:

a) If the leaders of the Party were convicted; should the ordinary members have been prosecuted as well?

b) Suppose the Party issued a statement saying it no longer believed in violent revolution. Would this change the situation?

c) Does the fact that the Communists only believe in revolution and have never attempted one in the United States make a difference?

d) Suppose the United States and Russia became more friendly. Should this make any difference in our treatment of Communists in America?

e) What did Justice Douglas mean by the statement, "Once we start down the road we enter territory dangerous to the liberties of every citizen"?

2. As an assignment the class could be asked to suggest provisions for a law that would protect the government against rebellion and yet not infringe the rights of the people.

3. Assume that a member of the class was a member of an extremist racial group that advocated establishment of a separate state for Negroes and that he had been arrested for advocating the overthrow of the government. With the class sitting as a Court, have one student conduct the prosecution and another defend the accused.

## Come Out and Fight

It is obvious in this, and in the earlier readings in this section that a good deal of confusion and contradiction is contained in the record of the Court on the subject of control of Communist subversion. This confusion will undoubtedly be reflected in the classes response. Students customarily expect to find a "right" answer to every problem. Here there is no "right" answer, indeed there may not even be a satisfactory one. The principal point in this and in the preceding lessons is the difficulty of translating into practical, workable terms such an ideal as freedom, an ideal which sounds so simple. It is of value to remind ourselves that this is a never-ending process. The Commonweal selection in this lesson puts it succintly! "Involving as they do classic questions concerning the relation of the individual and the State, of the demands of freedom and the necessity for security, the decisions are admittedly complex. They fall into that large area where there are no simple, clear-cut answers, that area occupied by profound problems that will be forever debated because they can never be finally settled."

The crux of the decisions discussed in these selections is that there will be some regulations of the Communist party, not nearly to the extent that the F.B.I. or some Congressional Committees would like, but more than a complete libertarian would approve. This may be as close as we can come to a solution; sufficient restraint to safeguard the nation's vital interests with a watchful eye on the dangers that such restraints pose to the First Amendment freedoms of all citizens.

Suggested Procedures:

1. Questions for discussion:

a) Of what significance is the fact that as of 1961, the Communist Party had been fighting the law for 11 years--and the fight was still not ended.

b) Does the fact that the Court decided these cases by a vote bear any implication for the future? Does this tell us anything about the issue in these cases?

c) The Commonweal editorial said that these cases fall into that large area where there are no simple, clear-cut answers, that area occupied by profound problems that will be forever debated because they can never be finally settled. What does this statement mean? Can you think of a way to settle the problem?

d) If you were a lawyer for the Communist Party, what advice would you give it as to how the leadership should behave? If you were a government lawyer, what evidence would you want before you went into Court?

2. Ask the students to write a paper discussing how threats to national security are handled in authoritarian states. Compare their methods with those used in the United States. Which are more effective? Which do you prefer? Why?

## THE FIRST AMENDMENT AND SLANDER, LIBEL, AND CENSORSHIP

### Free Speech--From Out of the Sewer

This selection, which is concerned with group libel and slander, opens a new aspect of our study, but the issue remains the same. We are once again faced with the problem of conflicting rights. In this instance we are faced with the need of protecting the First Amendment freedoms of the citizen while preserving law and order. To some it may seem that the only way to accomplish this is to limit free speech and free press. The following case may be compared with the Terminiello case studied at the beginning of the unit.

Suggested Procedures:

1. Topics for Discussion:

a) What did Justice Frankfurter mean when he said that people's reputations are bound up in the groups to which they belong?

b) The majority decision put great emphasis on the fact that there is a long history of racial trouble in Chicago. Do you think that fact should influence the Court when it is considering a Constitutional question?

c) What dangers does Justice Black point to in his dissent?

d) Should the Supreme Court be influenced by the expressed will of the legislature?

2. Assignment Topic:

Since local officials have the responsibility of protecting the citizens of their community, what means are at their disposal for preventing trouble between various groups? Are there any ways of achieving harmony without infringing someone's rights? Are there any ways in which the First Amendment can be used to further harmony in the community?

## All The News That's Fit to Print--So Print It!

The line between freedom and license in the realm of libel and freedom of the press is illustrated by a case brought against The New York Times by five local officials in Alabama who felt they had been defamed by the material contained in a paid advertisement run in the paper. The primary issue was not the specifics of the advertisement but the degree of responsibility of a paper for its contents.

At the heart of the matter was the recognition that one of the cornerstones of a free country is a free press. Yet, there is a difference between a free press and a responsible one. No one considers criticism and comment as abuses. However, as with so many other issues, how far can one go? Must the comment be true? Can it be opinion? Can allegations be made with impunity?

The Supreme Court has ruled that in commenting on public officials only actual malice is libelous. Since malice is a matter of intent, it is almost impossible to prove. The net result of this decision is to allow almost absolute freedom in writings concerning public officials and policy. By way of justification, the decision cites the need for full and free debate of all matters of public concern and the fact that public officials have access to means of responding. The same wide latitude does not apply to attacks on private citizens.

Suggested Procedures:

1. Topics for discussion:

a) Why do you think there is a distinction made between criticism of public officials and criticism of private citizens?

b) The press and periodicals were almost unanimous in hailing this decision as a great victory for freedom. Why do you think they were so enthusiastic?

c) Do unfounded, distorted and unfair attacks on a famous person always hurt that person?

d) What would have been the result if the judges had ruled the other way?

2. Class exercise:

a) Have each student select a well-known figure and write a brief paper criticizing him. Ask the student to speculate what might result should the paper be published.

## Sex is Art--Sometimes

Except for an occasional dissent (see Justice Douglas' opinion), there is almost unanimity on the point that obscene literature is not protected by the First Amendment. The remaining problem is deciding what is and what is not obscene. The Roth case established three guidelines for determining obscenity. The work must appeal to the prurient interest to be termed obscene. It must be considered as a whole and not in isolated bits. Contemporary community standards are to be used, rather than basing the decision on what may be harmful to the young. Since all three tests must be applied before a work can be considered obscene this has lead, in the name of free press, to a substantial loosening of standards in the past decade.

In addition to demonstrating the working of the First Amendment this selection can be used as a device for a study of the federal system. Almost every state and municipality has rewritten its statutes to comply with the guidelines set in the Roth case.

Suggested Questions for Discussion:

1. Do you think there should be different standards for different people, children and adults, for example? Who should set these standards?

2. Do you agree with those who feel that books dealing with sex encourage people to become sex offenders?

3. If the standards were made much stricter, do you think anything of value would be lost?

4. How do you feel about Douglas's statement that we should not regulate sex literature any more than we regulate literature dealing with other subjects? What would the result of such a decision be?

5. What do you think of the suggestion put forward in Commonweal that the problem be dealt with in regular trials as individual cases came up?

6. What does the phrase "contemporary community standards" mean? Do these standards change from place to place? From time to time?

## The First Amendment Goes To the Movies

The issues raised in "The Miracle" case are subtle and complex. At one and the same time the Court had to deal with the question of the extension of the First Amendment to movies, the problem of censorship, and the issue of sacrilege. Is the charge of sacrilege sufficient to warrant infringement of freedom of the press? If so, what constitutes sacrilege, and who shall decide? Indeed, what is religion? Could a small obscure sect bring such a charge?

We are faced here with a curious conflict between two First Amendment guarantees, those pertaining to speech and to religion. If the Court banned the film, was it not in effect "establishing religion"? If it permitted the film to be shown, was it not leaving the door open to a charge of allowing attacks on religion and thus not permitting "free exercise" of religion?

Suggested Questions for Discussion:

1. Who should decide what is sacrilege? The Court or the Church? Suppose one religion thinks some film is sacrilegious and another doesn't? Suppose the only ones opposed to a film are a small, obscure religious group.

2. What does the fact that the decision was unanimous tell you about the thinking of the Court on censorship questions?

3. What do you think a religious group should do about a film it finds offensive? What should an individual person do?

## The First Amendment--Patron of the Arts

This case discussed here bears many resemblances to "The Miracle" case. Here, however, this issue is morality rather than sacrilege. The Supreme Court was called upon to uphold the banning of a film which condoned an immoral act, adultery. The Court unanimously decided that the State of New York had no power to ban showing the film, giving varied grounds for this decision in six concurring opinions.

Suggested Questions for Discussion:

1. What is the difference between "immoral" and "obscene"? Are these separate questions? Should they be handled separately?

2. How would this decision effect a film dealing with drug addiction? With perverted sex? With lying or cheating? Should movies deal with such subjects?

3. Should anybody have the right to ban a movie on moral ground? If so, who should have this right?

4. Suppose the leader of your church denounced a movie as immoral and told all the members not to see it. What would you do? How would you feel about his act?

## The Law Comes First

In the selections read earlier the Court had substantially loosened the bonds of censorship and extended the First Amendment guarantees. In 1961, the Times Film Corp. attempted to remove the last major censorship device on the movies. The Chicago ordinance which required previews by local censors before a film could be displayed was typical of a great many local regulatory devices. The film distributor refused to submit his film, claiming that this amounted to pre-censorship or prior restraint, a practice specifically declared unconstitutional by the Supreme Court with regard to books, since objections to the film had been raised on the grounds of obscenity or immorality. The Court upheld the Chicago statute by a narrow 5 to 4 decision. In doing so, the Court once again refused to interpret First Amendment guarantees as absolute.

Suggested Procedures:

1. Questions for Discussion:

a) Why do you think the Court decided that movies had to be previewed, when books do not?

b) If the decision had gone the other way, would this have meant that the movies could have shown any kind of pictures? What control would be left?

c) What do you think of the dangers of having a licensing scheme applied to other means of expression as mentioned by Justice Warren?

d) If there is going to be previewing, should it be done in spearate localities? What would happen to a film if most reviewers approved, but a few did not?

e) What effects might this decision have on the type of movies made?

2. Since this is the last lesson in this section, the class could be asked to write a brief paper discussing censorship. Should there be censorship? Who should do the censoring? What should be censored? What are the advantages and disadvantages of a system that allows censorship and of one that does not?

# FREEDOM OF RELIGION

## Who Pays the Fare?

This reading provides a vivid picture of how the phrase freedom of religion has been defined. It has come to be interpreted as "separation of Church and State," meaning that government has no role in the religious life of its citizens. This interpretation receives a concise and accurate statement in the opening section of the majority opinion written by Justice Black in the Everson school buss case. Left undetermined are the limits of governmental activity in areas which might touch upon "establishing religion." There also remains the need for adjudication when the religious practices of one group conflict with the rights of other people.

Suggested Questions for Discussion:

1. Do you agree that government aid to a religion "establishes" religion? Suppose all religions are treated equally and are all helped in exactly the same way?

2. What is religion? Does a small, obscure group that has "strange" beliefs constitute religion?

3. Suppose a religious group believed in human sacrifice or ceremonial suicide. Would the government be guilty of violating the Constitutional guarantee of "free exercise of religion" if it interfered?

4. If not allowing the buses to be used made it impossible for some children to go to the religious school, would the government be "against" religion?

5. Since the families of children attending religious schools apy the same taxes as everybody else, should they be allowed to use the public school facilities like everybody else? If they don't take advantage of the public school system should they be excused from paying certain taxes?

6. Why was the idea of "separation of Church and State" built into the Constitution? Is there anything in early American history to account for it? Is this still the best policy today? How else could the matter be handled?

## Does God Go To School?

In the Everson case, despite the fact that both the majority and minority opinions reaffirmed the principle of separation of Church and State in ringing terms, the majority upheld the constitutionality of using the buses to provide transportation for religious school children. Here the issue was more substantial, Could the school buildings, and compulsory education law be utilized for religious instruction on a released time basis in the public schools themselves. The Court said that this violated the First Amendment.

The articles that follow the opinion appeared in Christian Century. They provide a good discussion of the constitutional question involved and analyze the Court's thinking. Again we see the Court striking a middle ground that does not satisfy either extreme.

Suggested Questions for Discussion:

1. Topics for discussion:

a) Does the decision which outlaws religious classes in school also prohibit teaching about religion?

b) Suppose a majority of the school officials and parents said they wanted religious instruction in the school. What could they do?

c) Does it cost the school anything to let the religious groups use the building? Does this matter?

d) Suppose the Churches paid for the use of the school. Would this change the situation?

## Does The School Go To God?

This lesson provides a vivid demonstration of the actual functioning of our federal system and the role of the judiciary in it. The McCollum case had seemed to settle the question of release time. However, this is far from so. The decision in the McCollum case had ruled that there could be no released-time religious education in the schools. It did not specifically outlaw all released-time education. Various localities, desiring to keep the practice, adopted their released-time religious education in order to comply with the Court ruling without ending the various programs. The Zosach case concerned a program run on school time but in Church facilities. This case demonstrates the never-ending task of the Courts as cases on the same subject keep coming up, each with some variation. It is through the study of these variables that we can detect the guidelines that the Court sets up and see how the Court balances opposing claims.

Suggested Questions for Discussion:

1. Does the fact that the classes were held outside of school mean the school had nothing to do with them?

2. Were the children who did not attend the outside classes being hurt in anyway? If they were, does this mean that government was unfair to them by allowing the outside classes on released-time?

3. Is there a difference between helping religion and cooperating with it?

4. Should schools excuse pupils on religious holidays, even if the school is open that day?

5. Are children who follow no religion being injured if the schools encourage religious observances?

## There's a Time and Place for Everything

In many ways this final case presents a more dramatic and vivid picture of the First Amendment in action than any we have studied. The case centers around an innocuous one line, 22 word prayer which was permitted in the New York State school system until outlawed by the Supreme Court as a clear violation of the ban on the establishment of religion as contained in the First Amendment.

The articles included here, while scholarly and thoughtful, reflect the emotionalism and near hysteria which has surrounded the case. More important, they give a dramatic picture of the workings of the Supreme Court. All three articles see broad implications in this decision and long-range effects, ranging all the way from constitutional amendment to a complete banning of religion in public life, indeed possibly a banning of all moral and ethical teaching as well.

Suggested Procedures:

1. The article from the New Republic might well be read and discussed in class. This should provide an excellent review of the material in the entire unit and also help with a difficult selection. The following questions can be raised:

a) Why does the New Republic suggest that the Court might have been wiser not to have heard this case? Do they have a right to refuse to hear cases? What does this mean?

b) Do you agree, that as far as prayer in the school is concerned, the decision will have little effect? If they are right, what does this tell you about the role of public opinion?

c) Why does the article fear that the decision will have strong effects on aid to education bills? What is the connection?

d) If this decision is really unpopular what can be done about it? Is the Supreme Court concerned with popularity? Are the Justices effected by the thinking of the people?

2. After having discussed the New Republic article, the students should be asked to express their opinion. Those that support the Court decision should be assigned the Commonweal article entitled "State-Sponsored Prayer" while those opposed should read the second Commonweal article, "The Forbidden Prayer." The following class period could be devoted to a class debate, in which each student should be prepared to defend his stand. By having to defend his position, the student will not only have to clarify his thinking on this point, but also call upon his knowledge of all of the issues raised in earlier sections of this study supported by the specific information acquired.

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## STUDENT'S MANUAL

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# THE FIRST AMENDMENT IN ACTION

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# FREEDOM OF SPEECH, ASSEMBLY, AND PETITION

The first ten amendments to the Constitution constitute the so-called Bill of Rights. The first of these amendments contains exactly 46 words. In its entirety it says--"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Enough of the people alive at the time of the writing of the Constitution felt so strongly about the need for a Bill of Rights, that had it not been added it is doubtful if the Constitution would have been adopted at all.

The freedoms guaranteed by the First Amendment have often been called the "Great Rights." They affect each American in his daily life. Whether he knows it or not, the life of each citizen would be quite different were it not for these 46 words.

In the readings that follow you will study a number of actual cases, some of which may be familiar already. Each of these illustrates one way in which the First Amendment has been interpreted and how it effects the daily life of the average American.

## An Incident

A group of students eating lunch one day in a school cafeteria were talking about the school and what it was like to be a student there. One boy said, "There are many things that could be improved here." The others agreed. At that moment a teacher passed the table. He told the boy to stop talking, to move to another table, and to see him after school. After school he gave the boy detentions for "speaking about things he didn't know and causing trouble."

1. What is the real issue?
2. What are your beliefs about the real issue? Why?
3. How do your beliefs about the real issue relate to events in the case?

## Speech That Violates Public Peace

A young student, using a loud-speaker, addressed a crowd of about 75 people on a street-corner in the down-town district. During the course of the speech, the speaker became very excited and referred to the President of the United States as a "bum." He used similar expressions for the mayor of the city and for other local officials. He said, "the American Legion was a Nazi Gestapo" and that Negroes don't have equal rights and that they should rise up and "fight for their rights."

There was heckling, and angry murmurs arose from the crowd. Some seemed to agree with the speaker, and others were against him. There was some loud talk from the audience but no real fighting. One man in the crowd became particilarly angry and told a policeman that, if the law didn't stop the speaker, he would do it himself. At this point the policeman interrupted the speaker and told him to stop. The speaker refused. The policeman then arrested him on a charge of disorderly conduct. After a trial, he was convicted and sentenced to city jail for 30 days. His lawyer appealed the decision. Eventually the case reached the U.S. Supreme Court for final decision.[1]

Questions to Help you Decide:

1. If you were in the crowd and disagreed with the speaker, what would you do? What if you agreed or were just interested?

2. If you were the policeman, how would you handle the speaker? The crowd? The man who threatened the speaker?

3. How would you feel after the speaker was arrested? How could he be arrested if all he was doing was speaking?

---

[1] Feiner v. New York, 340 U.S. 315 (1951).

## The Supreme Court Speaks

In deciding the case just described the Supreme Court divided 6 to 3.

One judge, Chief Justice Vinson, felt the speaker was guilty:

> The police made no effort to interfere with petitioner's speech, but were first concerned with the effect of the crowd on both pedestrian and vehicular traffic. . . . We have the impression that he was endeavoring to arouse the Negro people against the whites, urging them to rise up in arms and fight for equal rights. . . . Some of the onlookers made remarks to the police about their inability to handle the crowd and at least one threatened violence if the police did not act. There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, the officers finally "stepped in to prevent it from resulting in a fight.". . .
>
> Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. . . . (The) trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. . . .
>
> We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and also are mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. . . . It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when, as here, the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. . . . The findings of the state court as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officer convince us that we should not reverse this conviction in the name of free speech.

Another judge, Justice Black, felt the speaker was not guilty:

> It is neither unusual nor unexpected that some people at public street meeting mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare when controversial topics are discussed that an outdoor crowd does not do some or all of these things. Nor does one isolated threat to assault the speaker forebode disorder. . . .
>
> I reject the implication. . .that the police had no obligation to protect petitioner's constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of

perserving order, they ever can interfere with a lawful public speaker, they must first make all reasonable efforts to protect him. Here the policeman did not even pretend to try to protect petitioner. According to the officers' testimony, the crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault petitioner but the officers did nothing to discourage this when evan a word might have sufficed. *Their duty was to protect petitioner's right to talk,* even to the extent of arresting the man who threatened to interfere. *Instead*, *they shirked their duty and acted only to suppress the right to speak*. . . .

In my judgment today's holding means that as a practical matter, minority speakers can be silenced in any city. . . . (The) policeman's club can take heavy toll of a current administration's public critics. Criticism of public officials will be too dangerous. . . .

## Speech That Creates Public Anger

The following case is an example of actual fighting and violence occurring at a public meeting. Yet because this incident took place in a different state, the speaker therefore being accused of breaking a different law, the Supreme Court handed down a new opinion.

In reading the descriptions of the case which are drawn from the Court record, you should again pay very close attention to the details and circumstances surrounding the event. You must remember that in these borderline cases the Court often places special importance on a seemingly unimportant detail. See what differences you can find between this case and the one you read earlier.

### The Incident

Father Terminiello was a Catholic Priest, though he had been suspended by his Bishop. He announced that he was coming to Chicago for a public meeting and rented a meeting hall for that purpose. Terminiello was quite well known. He had a long history of making anti-Negro and anti-Jewish statements. He also had been accused of calling anyone who disagreed with him a Communist. Because he was known to have made pro-Hitler and pro-Franco statements, he had been widely accused of being a Fascist himself, although he denied this. When he announced his intention of speaking in Chicago, a wave of protest arose and demands were made that he be denied permission to speak. Terminiello was not prevented from holding his meeting, however. In fact, the city of Chicago assigned a large number of police to make sure the meeting was an orderly one. On the night of the meeting a large crowd had collected. About a thousand people crowded into the hall. Most, but no all, were friendly to the speaker. Outside there were at least a thousand more, mostly opposed to the speaker. Following is a description of the scene as described by Terminiello himself:[2]

> We got there at approximately fifteen or twenty minutes past eight. The car stopped at the front entrance. There was a crowd of three or four hundred congregated there shouting and cursing and picketing. . . .
>
> When we got there the pickets were not marching; they were body to body and covered the sidewalk completely, some on the steps so that we had to form a flying wedge to get through. Police escorted us to the building and I noticed four or five others there.
>
> They called us, "damned Fascists, Nazis, ought to hang the so and so's.". . .
>
> The officers threatened that if they [the crowd] broke the door again they would arrest them, and every time they [the officers] opened the door a little to look out something was thrown at the officers, including ice-picks and rocks. A number of times the door was broken, was partly broken through. There were doors open this way and they partly opened and the officers looked out two or three times and each time ice-picks, stones and bottles were thrown at the police at the door. I took my place on the stage. . . .
>
> I saw rocks being thrown through windows and that continued throughout at least the first half of the meeting, probably longer, and again attempts were made to force the front door, rather the front door was forced partly. The howling continued on the outside, cursing could be heard audibly in the hall at times. Police were rushing in and out of the front door protecting the front door, and there was a general commotion, all kinds of noises and violence--all from the outside.

The Court heard other witnesses describe the scene, saying that the crowd reached an estimated number of 1,500. Picket lines obstructed and interfered with access to the building. The crowd became a surging howling mob, hurling curses at those who would enter. Those inside the hall could hear the loud noises and hear those on the outside yell "Fascists, Hitlers!" and other curse words. Bricks were thrown through the window panes before and during the speaking. Some twenty-eight windows were broken. The street was black with people on both sides for at least a block in both directions. Bottles, stink bombs and brickbats were thrown. Police were unable to control the mob which kept breaking the windows at the meeting hall, drowning out the speaker's voice at times and breaking in through the back door of the auditorium. Seventeen of thegroup outside were arrested by the police.

---

[2] Terminiello v. Chicago, 337 U.S. 1 (1949).

This was the scene even before Terminiello began to speak.

> Now I am going to whisper my greetings to you, Fellow Christians. . . . I said, "fellow Christians" and I suppose there are some of the scum got in by mistake. . . .
>
> And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake. . . .
>
> The subject I want to talk to you tonight about is the attempt that is going on right outside this hall tonight, the attempt that is going on to destroy America by revolution. . . .
>
> Now the danger we face--let us call them Zionist Jews if you will, let's call them atheistic, communistic Jewish or Zionist Jews, then let us not fear to condemn them. . . .
>
> Do you wonder they were persecuted in other countries?. . .
>
> They want to picket our meetings. They don't want us to picket their meetings. It is the same kind of tolerance, if we said there was a bedbug in bed, "We don't care for you," of if we looked under the bed and found a snake and said, "I am going to be tolerant and leave the snake there." We will not be tolerant of that mob out there. We are not going to be tolerant any longer. We are going to stand up and dare them to smear us. . . .
>
> We don't want them here; we want them to go back where they came from.

Witnesses reported that the audience inside the hall became very aroused and divided. The speech stirred the audience not only to cheer and applaud but to expressions of immediate anger, unrest and alarm. One called the speaker a "damned liar" and was taken out by the police. Another said that "Jews, niggers and Catholics would have to be gotten rid of." One response was "yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us."

Terminiello was arrested by the Chicago police and charged with breach of the peace. The Chicago law described breach of the peace as any "misbehavior which violates peace and decorum" and stated that the "misbehavior may constitute a breach of the peace of it stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." Terminiello's lawyers admitted that he was guilty under that law but maintained that the law was unconstitutional because it violated his constitutional right to Freedom of Speech.

Questions to Help You Decide:

1. If you were a negro or a Jew at the meeting how would you feel? What would you do? How would you feel when he was arrested?
2. If you agreed with the speaker, how would you feel? What would you do? How would you feel when he was arrested?
3. The speaker charged that all of the people who were against him were Communists. If this was true would it change your feelings towards him?

## The Supreme Court Speaks

In this case the Court divided five to four. One of the judges, Justice Douglas, felt that Terminiello should be acquitted:

> As we have noted, the statutory words "breach of the peace" were defined in instructions to the jury to include speech which "stirs the public to anger, invites dispute,brings about a condition of unrest or creates a disturbance. . ."
>
> The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in De Jonge v. Oregon, "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship and punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest. . . .
>
> The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand. . . .

Four of the judges upheld Terminiello's conviction. Justice Jackson explained their point of view in a dissenting popinion:

> This was not an isolated, spontaneous and unintended collision of political forces. It was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported into this country the strongarm technique developed in the struggle by which their kind has devastated Europe. Increasingly American cities have to cope with it. One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other's pickets; parade is met with counterparade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence. . . .

> The present obstacle to mastery of the streets. . . is the authority of local governments which represent the free choice of democratic and law-abiding elements. . . . The fascist and communist groups . . . resort to these terror tactics to confuse, bully and discredit those freely chosen governments. . . . And people lose faith in the democratic process when they see public authority flouted and impotent. . . .
>
> *Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish.* Where an offense is induced by speech, the Court has laid down and often reiterated a test of the power of the authorities to deal with the speaking as also an offense. "The question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger. . . that Congress has a right to prevent." Mr. Justice Holmes in *Schenck* v. *United States*.
>
> *We must bear in mind also that no serious outbreak of mob violence, race rioting, lynching or public disorder is likely to get going without help of some speech-making to some mass of people*.... .
>
> The ways in which mob violence may be worked up are subtle and various. Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. . . . The most insulting words can be neutralized if the speaker will smile when he says them, but a belligerent personality and an aggressive manner may kindle a fight without use of words that in cold type shock us. . . .
>
> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom it will convert the constitutional Bill of Rights into a suicide pact.

## Decisions in Similar Cases

Following are brief statements from famous decisions handed down by the Supreme Court in other similar cases:

1. The First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not intended to give immunity for every possible use of language.[3]

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[3] Justice Holmes, *Frohwerk* v. *United States*, 249 U.S. 204 (1919).

2. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we have encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.[4]

3. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional question. These include the lewd and obscene, the profane, the libelous and the insulting or filthy words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[5]

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[4] Justice Douglas, in dissent, Dennis et al. v. The United States, 341 U.S. 494 (1951).

[5] Justice Murphy, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

## Marching Through Dixie--First Amendment Style

We are all familiar with demonstrations. These expressions of the feelings of a group take many forms. We have seen marches, rallies, picketing, sit-ins, and other forms of group expression. While they differ in form from the usual exercise of free speech, they nevertheless fall under the protection of the First Amendment. We are all also familiar with the fact that many of the people taking part in these demonstrations have come into conflict with the law, especially with various state laws. In recent years, many of these cases involving demonstrations have reached the Supreme Court. The following selection concerns a typical case. Justice Stewart summarized the facts in the case of Edwards v. South Carolina:[6]

> The petitioners, 187 in number, were convicted in a magistrate's court in Columbia, South Carolina, of the common law crime of breach of the peace. Their convictions were ultimately affirmed by the South Carolina Supreme Court. . . .
>
> There was no substantial conflict in the trial evidence. Late in the morning of March 2, 1961, the petitioners, high school and college students of the Negro race, met at the Zion Baptist Church in Columbia. From there, at about noon, they walked in separate groups of about 15 to the South Carolina State House grounds, an area of two city blocks open to the general public. Their purpose was to "submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with the present condition of discriminatory actions against Negroes, in general, and to let them know that we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed."
>
> Already on the State House grounds when the petitioners arrived were 30 or more law enforcement officers, who had advance knowledge that the petitioners were coming. Each group of petitioners entered the grounds through a driveway and parking area known in the record as the "horseshoe." As they entered, they were told by the law

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[6] Edwards v. South Carolina, 372 U.S. 229 (1963).

enforcement officials that "they had a right, as a citizen, to go through the State House grounds, as any other citizen has, as long as they were peaceful." During the next half hour or 45 minutes, the petitioners, in the same small groups, walked single file or two abreast in an orderly way through the grounds, each group carrying placards bearing such messages as "I am proud to be a Negro," and "Down with segregation."

During this time a crowd of some 200 to 300 onlookers had collected in the horseshoe area and on the adjacent sidewalks. There was no evidence to suggest that these onlookers were anything but curious, and no evidence at all of any threatening remarks, hostile gestures, or offensive language on the part of any member of the crowd. The City Manager testified that he recognized some of the onlookers, whom he did not identify, as "possible trouble makers," but his subsequent testimony made clear that nobody among the crowd actually caused or threatened any trouble. There was no obstruction of pedestrian or vehicular traffic within the State House grounds. No vehicle was prevented from entering or leaving the horseshoe area. Although vehicular traffic at a nearby street intersection was slowed down somewhat, an officer was dispatched to keep traffic moving. There were a number of bystanders on the public sidewalks adjacent to the State House grounds, but they all moved on when asked to do so, and there was no impediment of pedestrian traffic. Police protection at the scene was at all times sufficient to meet any foreseeable possibility of disorder.

In the situation andunder the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous" "loud," and "flamboyant" conduct, which, as he later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arreseted the petitioners and marched them off to jail.

Upon this evidence the state trial court convicted the petitioners of breach of the peace, and imposed sentences ranging from a $10 fine or five days in jail, to a $100 fine or 30 days in jail. . . .

Questions to Help You Decide:

1. If you were one of the defendants would you appeal to Federal Court? On what grounds?

2. Do you think the fact that these events happened in South Carolina had any effect on what happened? Why?

3. Do you think that the defendants are guilty of disorderly conduct? Why?

## The First Amendment--200,000 Times a Day

[While noting that the 1963 Civil Rights March on Washington did not achieve the concrete demands of the marchers, a Time magazine article nevertheless declares that the march was a spectacular success. According to Time, civil rights leaders believed the march was successful because, as Martin Luther King said, "We have sharpened the conscience of the nation." But Time feels the march had real meaning because over 200,000 people, under the watchful eyes of the whole world, gathered together in peaceful protest and avoided rioting and bloodshed. Time feels that this dignified march clearly showed that "Negroes were able to accept the responsibility of first class citizenship."][7]

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[7] Time (Sept. 6, 1963), 13-15. (Reprinted by permission from TIME, The Weekly Magazine; Copyright, Time, Inc., 1963.)

## The First Amendment--Southern Style

The March on Washington had been a huge success. It had remained peaceful. There were no arrests. Partly as a result of this 'exercise in free speech, assembly and the right of petition" Congress had speedily enacted a meaningful Civil Rights law. In the spring of 1965 Dr. King, leader of the Southern Christian Leadership Conference and perhaps the best known civil rights leader in the nation, led a second great march, differing from the first in several significant ways. For one thing it was to be held not in Washington but in Alabama. This meant that the maintenance of law and order and the protection of the marchers would be under the control of the local police. It meant also that the marchers would be subject to state laws which were not designed to encourage such demonstrations In addition it meant that the goal of the march was the state capital at Montgomery and a hostile governor, not the Lincoln memorial and a sympathetic President as in the earlier march. This, too, was to be an exercise in free speech, the right of assembly, and the right to petition for a redres of grievances.

### Some Questions to Think About

1. If you were getting ready to go on this March in Albama, would you carry any weapons with you? What would you do f you saw others in the group with guns or knives?

2. You could expect many people to be unsympathetic asyou went through the state. What would you do if the following situtions arose:

   a. a group of people along-side the road made wisecracks and called you dirty names?

   b. a group of people marched ahead of your group ad carried signs which were just the opposite of your sign?

c. a bunch of kids threw sticks and rocks at your group and nobody stopped them?

d. some people in a car which blocked the road carried guns and said they would shoot if you didn't turn around and go back?

Following is an article entitled "Road From Selma: Hope and Death" which appeared in Newsweek.[8]

> [An article in Newsweek states that the Civil Rights March from Selma was a "symbolic triumph" despite the tragic death of a white civil rights worker. The article stresses, however, that the march did not accomplish any concrete objectives, since the enfranchisment of Negroes in the Deep South had been assured before the demonstration. The Newsweek article indicates that the march was an assertion by the protestors of their right to demonstrate and had become an end in itself. The article goes on to describe the events of the four day march.][8]

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[8] Newsweek (April 5, 1965), 23-26.

## Free Speech--And How

The rights guaranteed by the First Amendment are two edged. Just as the marchers had the protection of the Constitution, the critics of the March could exercise the same rights.

We have read one report which described the Selma March. The following selection describes the reaction of a Congressman from Alabama:[9]

> [Congressman William Dickinson declares that demonstrators on the March from Selma to Montgomery engaged in lewd and lascivious behavior. He produces signed affadavits from Alabama policemen and civilians to support his charge. His accusations were met by denials from newspaper men, priests, and officials who had participated in or watched the march.]

## THE FIRST AMENDMENT AND NATIONAL SECURITY

Most Americans like their freedoms. Most of them take them for granted and hardly ever think about them. Most Americans exercise then freely and enjoy doing so. They like to say what is on their mind. They like to be able to make suggestions and criticisms. They like to be able to read what they want and to have a wide and free press to choose from.

Despite these feelings it is still sometimes difficult to accept free speech and free press in all cases. If we hear someone saying something we agree with, or read something we like or believe, the natural thing is to want to hear or read more. At meetings therefore it is common to hear people say things like, "That's right," or "You tell 'em." On the other hand, if we hear or read things we don't like or don't believe, it is natural not to want to hear any more. At meetings such as these one can often hear remarks like, "You don't know what you're talking about," or "Why don't you shut up." If we hear that such a person has actually been stoped, we may know his rights have been violated, but it is natural not to et too upset about it and perhaps think, "Well, he was asking for it" or "e're better off without him."

Most Americans like what they hear at civil rights demontrations such as the ones we have read about. Very few Americans like whatthey hear when a Communist is speaking.

The question that comes up then is should a person who i seeking to make this a Communist country be protected by the Bill of Rigts? Can a person use the protection of the Bill of Rights to destroy th Constitution and the Bill of Rights? If we allow unlimited criticism and attacks on the government, are we in danger of turning the Bill or Rights into a "suicide pact" as Justice Jackson warned the country in the Terminiello decision? If we do not allow them to speak and write, what are we doing to the Bill of Rights?

## Don't Shout "Fire!"

The question concerning Communist attacks on the United States government first became a problem during World War I, when the Communists overthrew the Russian Government, with whom we were allied, and quickly make peace with Germany, with whom we were still at war.

The Supreme Court first considered a case involving Communists in 1919 in *Schenck* v. *United States*. Schenck was convicted under the Espionage Act of 1917 which had been passed during the war to enable the government to control foreign spies and subversives. Following is a portion of that act:[1]

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or *shall willfully obstruct the recruiting or enlistment service of the United States*, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Schenck was convicted under the last clause of the Espionage Act. As general secretary of the Socialist Party he had spoken and sent leaflets to men who had been called to duty by their draft boards. In the leaflet he stated that the draft was unconstitutional and constituted "a monstrous wrong against humanity in the interests of Wall Street's chosen few" and urged recipients to "assert your opposition to the draft." The decision that follows was written for a unanimous Supreme Court by Oliver Wendell

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[1] 50 U.S.C., 3.

Holmes, one of the most famous judges in the history of the Court. In it he states what has come to be called the "clear and present danger" doctrine. This idea has become an underlying principle in many subsequent decisions.

Justice Holmes, for a unanimous Court:[2]

> We admit that in many places and in ordinary times the defendents in saying all that was said. . . would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantial evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any Constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced . . . . If the act, its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime.

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[2] Schenck v. United States, 249 U.S. 47 (1919).

## The First Amendment--Not a Blank Check

Following the "clear and present danger" rule laid down in the Schenck case, several other cases were prosecuted successfully and were upheld by the Supreme Court. The most famous of these was the prosecution of Eugene V. Debs, a leading Socialist, who was sentenced to jail for 10 years for the same crime as Schenck: speaking and writing against the draft act during World War I. That many people did not agree with the Court is shown by the fact that Debs, *while still in jail*, ran as the Socialist Candidate for President in 1920 and received almost a million votes.

Shortly after the crisis of World War I had passed, another man was arrested and convicted for acts similar to those of Schenck and Debs. He was convicted of violating laws of the State of New York on Criminal Anarchy. This law says:[3]

> *Title 160*: Criminal Anarchy defined:Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.
>
> *Title 161*: Any person who:
>
> 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or;
>
> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence, or any unlawful means is guilty of a felony. . . .

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[3] *New York Penal Laws*: Laws of 1909, Chap. 88.

The facts in the case of *Gitlow* v. *New York* were outlined in the Court's decision:[4]

> The following facts were established at the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist party. . . . The conference elected a National Council of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in the *Revolutionary Age*, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto. . . . Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the *Revolutionary Age* and the headquarters of the Left Wing and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. . . . It was admitted that . . . he went to all parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation.". . .
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> [The] Manifesto. . . condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Comminist Revolution" by a militant and "revolutionary Socialism," based on "the class struggle" and mobilizing the "power of the proletariat in action," through "mass industrial revolts developing into mass political strikes" and "revolutionary mass action," for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat," the system of Communist Socialism. . .

Judge Sanford wrote the decision for the court:

> The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. . . . The Manifesto, plainly, is neither the statement of

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[4] *Gitlow* v. *New York*, 268 U.S. 652 (1925).

> abstract doctrine nor. . . mere prediction that . . . mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall . . . through political mass strikes and revolutionary mass action over-throw and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society--the struggle for these--is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement. . . .
>
> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. . . .
>
> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be pehalized in the exercise of its police power. This determination must be given great weight. . . .

In this decision, the majority followed the precedents set down in the earlier Schenck and Debs cases and also implied that this case presented a "clear and present danger." According to the doctrine set forth by Holmes, it thus did not fall under the protection of the Bill of Rights. But Holmes himself was still a member of the Court. How did he feel?

Mr. Justice Holmes in dissent:

> If what I think the correct test is applied [clear and present danger], it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If

in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

## A Freedom is a Freedom is a Freedom

It is clear that the freedoms listed in the First Amendment can be limited when they seem to come into conflict with other rights of the people. Thus freedom of speech and of the press was limited when it appeared to cause a "danger" or "incited a riot" or was a "breach of the peace." This general practice of trying to secure the most liberty for the most people without infringing on the freedom of anyone more than necessary is often called the "balancing" approach. There are those who see another way. The following article entitled "The Bill of Rights and The Federal Government" was written by Supreme Court Justice Hugo L. Black:[5]

> [Supreme Court Justice Hugo Black notes that great differences of opinion exist concerning the degree to which the Bill of Rights should influence the lawmaking powers of Congress. In contrast to those who think the Bill of Rights are but vague guidelines, Black believes that they contain absolute principles which should be followed. However Black does assert that in any case which involves conflict between the government's right to make war and the individual's right to sanctity of private property, national security should take precedence.]

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[5] Hugo L. Black, "The Bill of Rights and The Federal Government" in The Great Rights, Edmond Cahn, (The Macmillan Co., New York, 1963), 44-45, 55, 57-63.

## It's Clear And It's Present

The differences between those who support the "balancing" approach and those who support the "absolute" approach show that there is still wide disagreement in the basic approach to the Bill of Rights. The problems created by those who speak, teach, and write against the United States have never been wholly settled. During the period of the Cold War, perhaps the single most difficult problem the Court has faced is what to do about the threat posed by the Communists within, Americans, who are Communists and who use the protection of the First Amendment to attack the United States. Congress acted to prevent or at least to limit these attacks. The laws passed have all been attacked by the Communists in America and by others who are not Communists, on the basis that they infringe the rights of all Americans to freedom of speech, press, assembly and petition as guaranteed by the First Amendment. The principal laws which Congress has passed include:

1. The Smith Act of 1940.[6] This law makes it a crime for any person to . . . "abet advise or teach the the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence. . . ." [or] "with the intent to cause the overthrown or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in in the United States by force or violence."

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[6] 18 U.S.C. 371.

2. The Internal Security Act of 1950 (McCarran Act) and the Communist Control Act of 1954. These laws extend the provisions of the Smith Act, requiring the Communist Party and all other organizations dominated by the Communist Party to register with the United States government.

In 1951, in the Dennis case the Supreme Court considered the constitutionality of the provisions of the Smith Act. This case has become one of the most celebrated and controversial cases in modern history.

In July of 1948 the government indicted twelve members of the Central Committee of the Communist Party of the United States, the controlling group in the Party, for conspiracy under the Smith Act. Subsequently, the case against William Z. Foster, Chairman of the Committee, was dropped because he was very ill. The trial lasted until September of 1949. The defendants were convicted and also lost an appeal in the Circuit (Lower Federal) Court. They then appealed to the Supreme Court of the United States. Because of the seriousness of the issue which involved direct conflict between basic Constitutional freedoms and a serious threat to the national security, most of the judges decided to hand down separate opinions.

Mr. Chief Justice Vinson, speaking for the Court:[7]

> The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. That court [Court of Appeals] held that the record in this case amply supports the necessary finding of the jury that petitioners, the leaders of the Communist Party in this country, were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared. Petitioners dispute the meaning to be drawn from the evidence, contending that the Marxist-Leninist doctrine they advocated taught that force and violence to achieve a Communist form of government in an existing democratic state would be necessary only because the ruling classes of

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[7] _Dennis_ _et_ _al_. v. _United_ _States_, 341 U.S. 494 (1951).

that state would never permit the transformation to be accomplished peacefully, but would use force and violence to defeat any peaceful political and economic gain the Communists could achieve. But the Court of Appeals held that the record supports the following broad conclusions: . . . that the Communist Party is a highly disciplined organization, adept at infiltration into strategic position, use of aliases, and double-meaning language; that the party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the party;. . . that the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence. . . .

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not hthe question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion. . . .

Mr. Justice Douglas, in dissent:

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. . . . But the fact is that no such evidence was introduced at the trial. There is a statute which makes seditious conspiracy unlawful. Petitioners, however, were not charged with a "Conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force and violence. It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: Foundations of Leninism by Stalin (1924), the Communist Manifesto by Marx and Engels (1848), State and Revolution by Lenin (1917), History of the Communist Party of the Soviet Union (1939).

These books are to Soviet Communisn what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the government is. The Act, as construed, required the element of intent--that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen. . . .

Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world. . . .

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed.

> The nature of Communism as a force on the world scene would, of course, is relevant to the issue of clear and present danger of petitioners' advocacy with the United States. But the primary consideration is the strength and tactical position of the petitioners and their converts in this country. On that there is no evidence in the record. If we are to take judicial notice of the threat of Communists within the nation it should not be difficult to conclude that as a political party they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state which the Communisits could carry. Communism in the world scene is no bogey-man; but Communists as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion when bread lines were long, when the unemployed walked the streets, when people were starving the advocates of a short-cut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it. . . .
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> The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and government; the extent to which they have in fact infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works and other critical places--these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril. To believe that petitioners and their following are placed in such critical positions as to endanger the nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the F.B.I.; that in case of war with Russia they will be picked up overnight as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise. . . .

The press gave the decision in the Dennis case widespread coverage, mostly favorable. The following appeared in Time:[8]

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[8] Time (June 11, 1951), 26. (Reprinted by permission from TIME, The Weekly Magazine; copyright, Time, Inc., 1951)

[An article in *Time* discusses the recent Supreme Court decision which upheld the constitutionality of the Smith Act. The article notes that the Court was divided, for the minority felt that the Smith Act violates the right to free speech. The majority believed that it was illegal to advocate the overthrow of the government under any circumstances.]

*Commonweal* also commented on the Dennis case:[9]

[A discussion of the Dennis case in *Commonweal* notes that there was little doubt that the men convicted as Communists were guilty as charged. But *Commonweal* feels that there are disquieting aspects about the decision, since most judges admit there is little chance of a Communist revolution. The magazine feels that while Marxist ideas many present a threat to our disillusioned society, they fear the decision is more of a rationalization than a reasoned work.]

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[9] *Commonweal* (June 27, 1951), 252-253.

## Come Out and Fight

It is apparent that no one could be pleased by all of the Court's actions. Surrounded by confusion and argument, the question of how to protect this country against the Communist threat troubled many citizens. Equally troubled were those who were concerned with the necessity of protecting the basic freedoms of all Americans.

In 1961 the Supreme Court handed down another group of decisions. U.S. News and World Report describes the background scope and some of the possible implications of these decisions.[10]

> [An article in U.S. News and World Report notes that life for a Communist in the United States has been rendered more complicated by recent Supreme Court decisions. According to the rulings Communists are now required to register with the Justice Department as agents of the Soviet Union, and any active member may be jailed if he advocates violent overthrow of the government. Among the many consequences of the decision are (1) that the government can prosecute companies that are alledged to be Communist fronts and (2) that under the Smith Act the government must prosecute Communists individually and not in groups. The article concludes by stating that these decisions have not concretely settled the question of Communist subversion, and that more court cases are sure to follow.]

Editorial comment on these 1961 decisions of the Supreme Court appeared in Commonweal:[11]

> [An editorial in Commonweal expresses dissatifaction with the recent decision of the Supreme Court. The editorial agrees with Justice Douglas that "The first banning of an association because it advocates hated ideas. . . marks a fateful moment in the history of a country." Commonweal feels that "beliefs" were on trial in these recent decisions and the editors fear that the Court has made a ruling that is indifferent to the rights and liberties guaranteed to the individual under the Bill of Rights.]

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[10] U.S. News and World Report (June 19, 1961), 42-44. (Reprinted from "U.S. News and World Report" published at Washington. Copyright 1961, U.S. News and World Report, Inc.)

[11] Commonweal

## THE FIRST AMENDMENT AND SLANDER, LIBEL, AND CENSORSHIP

Slander, libel, sacrilege, obscenity, immorality. These five words have several things in common: they all involve speaking or writing, they are all considered to be abuses of free speech and a free press, and no two people can agree on exactly what each of these words mean.

In this section of our study of the First Amendment we will examine some of the controversy existing in this area. Since everyone reads books and newspspers, listens to the radio, and watches television and the movies, these issues have influenced important parts of our lives in the past and will continue to do so in the future.

## Free Speech--From Out of The Sewers

There is one limitation on the First Amendment freedoms that has never been seriously challenged and that meets with general approval. This relates to the laws against slander and libel. Slander is any spoken communication that hurts a person's reputation, his self-regard or damages him in the opinion of others. Libel is the same thing, except that it is written instead of spoken. The laws against these practices go back even further than the history of the country. Even those who are most opposed to limitation of First Amendment guarantees agree that a person should be protected from false and damaging written or spoken attacks.

Although a good many lawsuits involve libel and slander, there is very little argument as to whether or not these laws are constitutional. The lawsuits are usually brought to determine whether a given act or word is actually libelous and to fix the extent of the damage. One area, however, is not quite so clear. Suppose the libel or slander is directed against a group and no single individual can claim he has been hurt except to the extent that he is a member of the group. If a person says or writes things like, "all Irishmen are drunks," or "all Jews are misers," or "all Negroes are lazy," who has been damaged? Can an individual Irishman, Jew or Negro sue for damage? Can the person who said these things be punished?

The law has decided over the years that a small groups such as a club or a company or a charity may sue. However, the large question of how to protect racial, religious or national groups still remains. Because recent history has witnessed many attacks on people because of their race, religion, or nationality, a number of states have tried to work out laws that will prevent such smear attacks. The selection that follows concerns an attempt to enforce one such law.

The state of Illinois passed a law which made it a crime to sell, advertise, or distribute any printed matter, moving picture, play, etc. which showed "depravity, criminality, unchastity, or lack of virture of a class of citizens of any race, color, creed or religion." It would thus constitute a crime to distrubute material which held a group up to contempt or derision or caused members of this group to lose standing in the community or self-respect.

This law was put to the test in 1952 when a man named Beauharnais, the founder, director, and president of an organization in Chicago called the "White Circle League of America," distributed a paper which in inflamatory language charged Negroes with all sorts of evil acts--aggressions, rapes, robberies, drug addiction and similar offenses. The pamphlet went on to call the Mayor and City Council of Chicago to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons" by the Negro. Following a call for "One million self-respecting white people in Chicago to unite" came the statement that "if persuasion and the need to prevent the white race from becoming mongrolized by the negro will not unite us, then the aggressions, rapes, robberies, knives, guns and marijuana of the negro surely will."

Beauharnais was arrested and convicted under the Illinois law against group libel. He appealed to the Supreme Court.

Mr. Justice Frankfurter, speaking for the Court:[1]

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[1] Beauharnais v. Illinois, 343 U.S. 250 (1952).

No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, user of marijuana. The precise question before us. . . [involves libel] directed at designated collectivities and flagrantly disseminated. . . But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the maniforld adjustments required of free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, played a significant part. The law was passed on June 29, 1917, at a time when the State was struggling to assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups--foreign born brought to it by the crest of the great wave if immigration, and Negroes attracted by jobs in war plants and in allurements of northern claims. Nine years earlier, in the very city where the legislature sat, what is said to be the first nothern race riot had cost the lives of six people, left hundreds of Negroes homeless and shocked citizens into action far beyond the broders of the state. Less then a month before the bill was enacted, East St. Louis had seen a day's rioting, prelude to an outbreak, only four days after the bill became law, so bloody that it led to Congressional investigation. A series of bombings had begun which was to culminate two years later in the awful race riot which held Chicago in its grip for seven days in the summer of 1919. Nor has tension and violence between the groups defined in the statute been limited in Illinois to clashes between white and Negroes.

In the face of this history and its frequent obligato of exteme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. . . .

Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in thegroup, even though not formally corporate, to which he belongs. . . . Such group-protection on behalf of the individual may, for all we know, be a need not confined to the part that a trade union plays in effectuating rights abstractly recognized as belonging to its members. It is not within our competence to confine or deny claims of social scientists as to the dependence of the indivudual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded to him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as it does to his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party.

Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. While this Court sits it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled. . . .

Mr. Justice Black, in dissent:

My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. I reject the holding that either state or nation can punish people for having their say in matters of public concern. . . .

Unless I misread history the majority is giving libel a more expansive scope and more respectable status than it was ever accorded. . . . For here it is held to be punishable to give publicity to any picture, moving picture, play, drama or sketch, or any printed matter which a judge may find unduly offensive to any race, color, creed or religion. In other words, in arguing for or against the enactment of laws that may differently affect huge groups, it is now very dangerous indeed to say something critical of one of the groups. And any "person, firm or corporation" can be tried for this crime. "Person, firm or coporation" certainly includes a book publisher, newspaper, radio or television station, candidate or even a preacher. . . .

No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion. Today Beauharnais is punished for publicity expressing strong views in favor of segregation. Ironically enough, Beauharnais, convicted of crime in Chicago, would probably be given a hero's reception in many other localities, if not in some parts of Chicago itself. Moreover, the same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states or advocating equality and nonsegregation. . . .

## All The News That's Fit to Print--So Print It!

Perhaps the most sensitive yet most important area of conflict between the libel laws and the First Amendment involves freedom of the press. Everyone favors freedom of the press since this is essential for preserving democratic institutions and for keeping the country informed. The great newspapers and magazines in this country distribute millions of copies. If they publicly attack an individual, they can do him immense harm. The area most difficult to regulate is where these mass publications comment and express opinions about public officials.

The following incident developed when several local officials in Alabama felt they had been libeled by material printed in The New York Times. Time carried the story:[2]

> [Time discusses a libel case which was brought against the New York Times for printing an inaccurate and allegedly inflamatory ad. The court's decision advanced the boundaries of free press and free speech further than they had legally reached before. A party would violate the law only if the criticism was "deliberately and recklessly" false.]

National Review offered comment and opinion:[3]

> [A National Review article cautiously applauds the recent decision of the Supreme Court which permits freedom of speech up to the point where it entails deliberate malice. The article states that in the fact of "the monster state" of our era it is necessary for individual freedoms to be preserved at all costs.]

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[2] Time (March 20, 1964), 78. (Reprinted by permission from TIME, The Weekly Magazine; copyright, Time, Inc., 1964).

[3] National Review (March 22, 1964), 22. (NATIONAL REVIEW, 150 East 35 Street, New York, N.Y., 10016.)

## Sex is Art--Sometimes

One final problem remains in the survey of the First Amendment rights of free speech and free press, and that is the problem of censorship. This problem has two main aspects. One deals with sacriligious material, spoken or written material that attacks religion in general or a specific religion. The second deals with obscene or pornographic material, or to put it simply "dirty" books and pictures.

It would seem that in the matter of pornography there would be no problem. Every Supreme Court justice, even those holding "absolute" views of First Amendment freedoms, has agreed that the First Amendment does not protect material of this kind. There are federal laws against it and laws in every one of the 50 states. Anyone who has ever seen a "dirty" book or movie knows what it is when he sees it. This is the material usually referred to as "hard-core pornography" and is clearly outlawed. The problem arises with borderline material. What one person finds objectionable, another finds quite innocent. What one person considers to be trash, another considers to be high art. In short, who is going to say what is obscene?

Following is a list of famous authors who have one thing in common: Swift, Bronte, Hawthorne, Eliot, Hardy, Whitman, Montaigne, Balzac, Zola, Flaubert, Twain, Joyce. Each of these authors, whose works are now considered to be classics, was at one time or another in trouble with some censor who thought something he had written was obscene or immoral.

As with other issues, when various works run afoul of the laws of the nation or states and the defendants plead the First Amendment, the cases come before the Supreme Court. In recent years one of the most famous cases on this question is the Roth case. The guide lines set down in this decision established a precedent, and most of the states have rewritten their obscenity laws to conform with these guide lines. Roth conducted a business in New York the nature of which was the publication and sale of books, photographs and magazines. He promoted his sales by advertising and distributing circulars. The merchandise could also be purchased through the mail. He was arrested for violating the federal obscenity statute and indicted on a 26 count charge. Upon conviction, he appealed to the Supreme Court.

Mr. Justice Brennan speaking for the Court:[4]

> All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment if the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956. . . . We hold that obscenity is not within the area of constitutionally protected speech or press... .
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> However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. . . .
>
> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress, or by the states. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does

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[4] Roth v. United States, 354 U.S. 476 (1957).

not treat sex in a manner appealing to prurient interest. . . . Both trial courts below sufficiently followed the proper standard. . . . [The] trial judge instructed the jury as follows:

. . . The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, the young, the immature, or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .

The test in each case is the effect of the book, picture or publication *considered as a whole*, not upon any particular class, but *upon all those whom it is likely to reach*. [Emphasis added.] In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards. . . .

In summary, then we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited. . . .

Mr. Justice Doublas, in dissent:

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the state to step in and punish mere speech or publication that the judge or jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of *unlawful* action is drastically to curtail the First Amendment. . . .

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards. . . .

As noted, the trial judge in the Roth case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends "the common conscience of the community." That standard is, in my view, more inimical still to freedom of expression.

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law. ... abridging the freedom of speech, or of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating sex is concerned?. . .

> For that test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless.
>
> I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

The following selection presents a thoughtful commentary which appeared in Commonweal immediately following the Supreme Court action in cases involving obscenity:[5]

> [The author notes that the recent Supreme Court decision offers no help in devising a well defined standard in order to judge obscenity. The author feels that, in order to perserve freedom of speech, obscenity cases can only be solved by achieving a balance between the rights of the individuals to free speech and to protect against potentially harmful material.]

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[5] Commonweal (July 12, 1957), 363-364.

## The First Amendment Goes to the Movies

One of the things that makes study of the First Amendment so interesting and keeps the courts so busy is the fact that the Bill of Rights was written in the 18th century. Certainly when the framers of the Constitution spoke of freedom of speech and of the press they were not thinking of the movies or of radio and television. Since there were no movies in those days obviously the founding fathers did not have them in mind. The question is, however, would movies have been specifically included in the guarantees of the First Amendment? The case that follows deals with this subject and with the problem of censorship, this time of a film that some thought was sacrilegious.

Way back in 1915 when movies were still in the silent one-reel days the Supreme Court decided[6] that "movies are a purely business undertaking, conducted for profit,and in no sense part of the press of the country." Had the situation changed by the late 1940's? A case involving a film entitled "The Miracle" raised this question.[7] The circumstances of the case were concisely stated by Mr. Justice Frankfurter:

> The Miracle, a film lasting 40 minutes, was produced in Italy by Robert Rosselini. Anna Magnani played the lead. . . . It was first shown at the Venice Film Festival in August, 1948. . . . According to an affidavit, from the Director of that Festival, if the motion picture had been "blasphemous" it would have been barred by the Festival Committee. In a review of the film in L'Osservatore Romano, the organ of the Vatican, its film critic. . . wrote: "Opinions may vary and questions may arise--even serious ones--of a religious nature. . . ." In October, 1948, a month after the Rome premiere of the "Miracle" the Vatican's censorship agency. . . declared that the picture "constitues in effect an abominable profanation from religious and moral viewpoints." . . . . The Italian Government's censor gave the "Miracle" the regular

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[6] Mutual Film Corp. v. Ohio Industrial Comm., 236 U.S. 230 (1915).

[7] Burstin, Inc. v. Wilson, 343 U.S. 495 (1952).

> . . . clearance. The film was freely shown throughout Italy, but was not a great success. Italian movie critics divided in opinion. The critic. . . speaking for the Christian Democratic Party, the Catholic party, profusely praised the picture as "a beautiful thing, humanly felt, alive, true and without religious profanation. . . ."
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> On March 2, 1949, the "Miracle" was licensed in New York State for showing without English titles. However, it was never exhibited until after a second license was issued on November 30, 1950 for the trilogy "Ways of Love," combining the "Miracle" with two French films . . . . All had English subtitles. Both licenses were issued in the usual course after viewings of the picture by the Motion Picture Division of the New York State Education Department. . . . The trilogy opened on December 12, 1950, at the Paris Theatre on 58th Street in Manhattan. It was promptly attacked as "a sacrilegious and blasphemous mockery of Christian religious truth" by the National Legion of Decency, a private Cahtolic organization. . . . However, the National Board of Review. . . recommended the picture as "especially worth seeing." New York critics on the whole praised "The Miracle"; those who dispraised did not suggest sacrilege. On December 27 the critics selected the "Ways of Love" as the best foreign language film in 1950. Meanwhile on December 23, Edwart T. McCaffrey, Commissioner of Licenses for New York City, declared the film "officially and personally blasphemous" and ordered it withdrawn at the risk of suspension of the license to operate the Paris Theatre. A week later the program was restored at the theatre upon the decision by the New York Supreme Court that the City License Commissioner had exceeded his authority in that he was without powers of movie censorship.

At this point the situation took a dramatic turn. On Sunday, January 7, 1951, Cardinal Spellman issued a statement that was read at all masses held that day at St. Patrick's Cathedral condemning the film and calling upon "all right thinking citizens" not to see it. This had the result of making the controversy front page news and resulted in a flood of statements supporting and objecting to the Cardinal's action. An even larger flood of sharply divided statements debated whether or not the film was indeed sacrilegious and suggested what should be done. The "Miracle" case went through the Court System of New York, which resulted in "The Miracle" losing its license and being banned. Thereupon, the distributor appealed to the Supreme Court.

Mr. Justice Clark, speaking for the Court:

The issue here is the constitutionality, under the First . . . Amendment, of a New York statute which permits the banning of motion picture films on the gound that they are "sacrilegious." That statute makes it unlawful "to exhibit, or to sell, lease or lend for exhibition at any place. . . in the state of New York, any motion picture film or reel unless there is at the time in full force and effect a valid license or permit therefor of the education department. . . ."

It is urged that motion pictures do no fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

To hold that liberty of expression by means of motion pictures is guaranteed. . . is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subseuqent punishment. On the contrary, New York required that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized may years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned.

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word in understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . ."

Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application

> of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures. . . .
>
> A state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."

The decision in "The Miracle" case received widespread attention in the nation's press. The following selections are typical of the reaction. The first is from Business Week:[8]

> [An article in Business Week comments on the historic decision of the Supreme Court which states that movies are entitled to the constitutional guarantee of free speech. The author believes that the decision will greatly restrict many local censorship boards, but he notes that the decision does not prevent a local board from outlawing a movie before it is released or from censoring a movie that is undisputably obscene.]

The following opinion appeared in the New Republic:[9]

> [An article in The New Republic states that the recent ruling of the Supreme Court which annuls the New York State ban on the movie, "The Miracle", is significant for two reasons: 1) It extends the First Amendment to movies. 2) It rejects "sacrilege" as a criterion for banning a movie. However, the author of the article fears that the movie industry, because of possible boycotts and censorship of films by special groups, will fail to take advantage of its newly won freedom. The author hopes that a "sense of high purpose" will influence movie makers to jealously guard their right to free expression.]

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[8] Business Week (May 31, 1952), 33. (Reprinted from the May 31, 1952 issue of Business Week by special permission. Copyrighted © 1952 by McGraw-Hill, Inc.)

[9] New Republic (June 23, 1951), 8. (Reprinted by permission of THE NEW REPUBLIC, © 1957, 1952, 1961, and 1962, Harrison Blaine of New Jersey, Inc.)

## The First Amendment--Patron of the Arts

During the 1950's and '60's the controversy over censorship and the movies continued. The sacrilege issue seemed to have seen settled, but the related issues of morality and obscenity have never been completely answered.

During these years the movies became more outspoken and "realistic." Some attributed this to the loosening of censorship, some to the competition of television, some to the competition of foreign "art" films which were well received in the United States, and some to a maturing of the American taste.

In 1959, one of the more "realistic" films, "Lady Chatterley's Lover," based on a novel by the noted author, D. H. Lawrence, opened after an extensive advertising campaign and amidst much publicity. The fact that the book had been the center of a long controversy concerning possible obscenity did much to stir up interest in the film.

The film opened in New York and promptly ran into trouble with the New York censors. The following story appeared in U.S. News and World Report:[10]

> [U.S. News and World Report describes how the Supreme Court recently overruled a New York State Court's decision which banned a movie based on the novel Lady Chatterley's Lover because the movie advocated adultry. The court ruled that movies are guaranteed the freedom of speech. The court did not discuss the issue of obscenity or pornography. The article notes that the judges were in disagreement as to whether the court should set itself up as a censor board to rule on movies on a case-by-case basis.]

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[10] U.S. News and World Report (July 13, 1959), 50. (Reprinted from"U.S. News and World Report" published at Washington. Copyright 1959, U.S. News and World Report, Inc.)

## The Law Comes First

Throughout the history of the movie some sort of review and approval has almost always been required before a picture could be relased to the public. This review has been done in a variety of ways, by the movie industry itself, by local boards in various cities and states, and by private groups who would make recommendations. The "Miracle" decision had said that movies were protected by the First Amendment as much as the press and other publications, but the question as to whether or not a film had to obtain approval before being released to the public had not been settled. One distributor decided to see if he could get his movie shown without holding and "previews" for local censorship groups.

The City of Chicago required that all films must be licensed before they may be shown in that city. One film distributor refused to submit his movie, was refused a license and appealed to the Federal Court. The New Republic carried the story:[11]

> [The New Republic reports on a case brought before the Supreme Court to test the constitutionality of a city's right to censor movies before they are shown. The Court decided that the city did have the right, even in a case where the movie was not known to be harmful in any way. The New Republic finds the ruling objectionable for they feel that no individual's freedom whould be infringed on without first ascertaining that an illegal act has been committed.]

The Christian Century commented on the case:[12]

> [An article in the Christian Century expresses apprehension that the recent ruling of the Supreme Court (which upheld the right of cities to censor movies before they are shown to the public) will establish a principle which will be applied to other forms of communication. The Christian Century feels that if the Court does not reverse itself on forecensorship "our future is not with the free."]

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[11] New Republic (February 27, 1961), 8. (Reprinted by permission of THE NEW REPUBLIC, © 1957, 1952, 1961 and 1962, Harrison Blaine of New Jersey, Inc.)

[12] Christian Century (February 8, 1961), 163-164.

## FREEDOM OF RELIGION

Perhaps nothing is more important and more personal to the average American than his religion. For this reason any dispute concerning freedom of religion is likely to become emotional and arouse deep feelings. The struggle to achieve freedom of religion is one that reaches back to the earliest days of American history and is, indeed, one of the basic reasons for the colonization of America.

Concerning religion, the First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." We have seen in our study of other First Amendment freedoms that it is not enough to say that these freedoms are guaranteed by the Constitution. Many questions remained to be settled after the Amendment was adopted. Many questions still remain.

The section that follows examines some of the problems that arise in trying to determine the meaning of the First Amendment as it touches upon religion. The question of the relationships among the government, religious groups, and individuals has often arisen in relation to education, an area in which all are vitally interested.

## Who Pays the Fare?

New Jersey enacted a law permitting local school boards to pay the costs of transporting children to religious schools just as the boards provided free bus service for the children attending public school. This law was challenged in court as constituting a violation of the First Amendment, and the case reached the Supreme Court.

Mr. Justice Black, speaking for the Court:[1]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." . . .
>
> Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to their church schools if the parents were compelled to pay for their children going to and from church schools out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions

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[1] Everson v. Board of Education of Township of Ewing, 330 U.S. 1 (1947).

intended to guarantee free transportation of a kind which the state deems to be the best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial school, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them. . . .

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Mr. Justice Jackson, in dissent:

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premises that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice.

Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school *is indistinguishable to me from rendering the same aid to the Church itself*. [Emphasis added.]

It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course--but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school--not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church?" But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid. . . .

## Does God Go To School?

Mr. Justice Black speaking for the Court in the case of McCollum v. Board of Education:[2]

> This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction isofar as that power may be restricted by the First[Amendment].
>
> The appellant, Vashti McCollum, began this action against the Champaign Board of Education. . . . Her asserted interest was that of a resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools. Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax-supported public schools where the children are to remain in attendance during the hours when the schools are regularly in session. Parents who violate this law commit a misdeameanor punishable by fine unless the children attend private or parochial schools. . . .
>
> Appellant's petition alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. The petitioner charged that this joint public-school religious-group program violated the . . . Constitution. The . . . petition was that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools in Champaign School District. . . ."
>
> Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. . . . The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish Rabbi. . . . Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. . . .
>
> The foregoing facts. . . how the use of tax-supported property for religious instruction and the-close cooperation between the school authorities and the religious council in promoting religious education.

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[2] McCollum v. Board of Education, 333 U.S. 203 (1948).

> The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment. . . as we interpreted it in Everson v. Board of Education. . . . [Emphasis added.]

Eight of the nine Supreme Court judges agreed with the decision just quoted. The ninth agreed with the ideas but felt that the "released time" did not fall under the protection of the First Amendment, but was a matter best left to the local governments.

This decision, which immediately affected millions of students in thousands of schools around the country, received a great deal of public attention. Much was written about the decision on both sides of the question.

The following articles were drawn from Christian Century. Both articles compare the McCollum case to the earlier Everson decision and attempt to come up with guidelines for understanding the problems relating to school-church relations.

The first article appeared immediately after the Supreme Court action:[3]

> [An article in Christian Century praises the Supreme Court's recent decision which reaffirms the constitutional principle that church and state must be competely separate institutions. The court's ruling forbids state aid to any church and ruled as unconstitutional the use of public school buildings and teachers for religious classes. The article notes, however, that this decision must not be misconstrued as being anti-religious for it does not imply the separation of religion from the life of the nation.]

Over a year later a second article explored the question of the Court's decision in regard to released time:[4]

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[3] Christian Century (April 7, 1948), 308-309

[4] Charles C. Morrison, "What Did the Supreme Court Say?" Christian Century (June 8, 1949), 707-708

[Charles Morrison, in an article in the Christian Century, asserts that he has always believed that religion should be included in the public schools' curriculum. Morrison stresses that he is in favor of the recent Supreme Court decision which reaffirmed the separation of church and state. However he feels that this case has caused much confusion in people's minds. Thus he discusses in detail what he considers the essential facts of the case.]

## Does The School Go To God?

As many who read the McCollum decision had predicted, a great many Boards of Education changed their programs regarding "released time" to comply with the Supreme Court decision. This is not to say that the practice was ended. There were many attempts to obey the law while still keeping some sort of "released time" program. In Zorach v. Clauson[5] the Supreme Court again considered the question of released time.

Mr. Justice Douglas, speaking for the Court:

> New York City has a program which permits its public schools to release students during the school day so that they may leave the school building and school grounds and go to religious centers for religious instruction or devotional exercise. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but have not reported for religious instruction.
>
> This "released time" program involved neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case, therefore, unlike McCollum v. Board of Education, which involved a "released time" program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment. . . which prohibits the states from establishing religion or prohibiting its free exercise.
>
> Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, contending it is in essence not different from the one involved in the McCollum case. . . .
>
> We could have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave school during hours on Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon for a family baptismal ceremony. In each case the teacher requires parental consent in

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[5] Zorach v. Clauson, 343 U.S. 306 (1952).

writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act. . . .

In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Mr. Justice Jackson, in dissent:

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compels each student to yield a large part of his time for public secular education and, second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes.

No one suggests that the Constitution would permit the State directly to require this "released" time to be spent "under the contol of a duly constituted religious body." This program accomplished that forbidden result by indirection. If public education were taking so much of the pupils' time as to injure the public or the students' welfare by encroaching upon their religious opportunity, simply shortening everyone's day would facilitate voluntary and optional attendance at Church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to the Church. Hence, they must be deprived of freedom for this period, with Church attendance put to them as one of the two permissable ways of using it.

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is an unconstitutional, in my view, when exerted by indirection as when exercised forthrightly.

## There's A Time and Place For Everything

In 1962 the Supreme Court issued its decision in Engel v. Vitale.[6] This case concerned a one line prayer which the New York State Board of Regents, a governmental body in charge of schools throughout the state, had authorized the local school boards to use in the schools. A number of the local boards used this prayer until the practice was challenged in court and ultimately declared unconstitutional by the Supreme Court.

The storm of controversy that had raged over the earlier decision was mild compared to the reaction that followed this one.

The first selection is a commentary that appeared in the New Republic:[7]

> [An article in the New Republic discusses a ruling by the Supreme Court which outlaws the recitation in the public schools of state composed prayers. The article notes that the ruling will probably not stop prayer in schools because the court has not forbidden the recitation of prayers composed by an outside group. The article expresses fear that the ruling may have detrimental political effects because right wing groups are apt to use this decision to discredit the court. As a result federal aid to education may become unpopular.]

The last two selections, articles which appeared in Commonweal, discuss the broad implications and the impact of the school prayer case. The first article is "State-Sponsored Prayer" by Leo Pfeffer:[8]

> [Leo Pfeffer, in Commonweal, asserts that the Court's decision to forbid the recitation of a state sanctioned prayer in the public schools is completely consistent with the principle of separation of church and state. The author notes, however, that while the church is forbidden from directly aiding a religion, state actions for the general good often indirectly aid a particular religion. Pfeffer points out that the actual state control of religion has had a particularly ignoble history and often had detrimental effects for the particular religion involved.]

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[6] Engel v. Vitale, 370 U.S. 421 (1962).

[7] New Republic (July 9, 1962), 3-5. (Reprinted by permission of THE NEW REPUBLIC, c 1957, 1952, 1961, and 1962, Harrison-Blaine of New Jersey, Inc.)

[8] Leo Pfeffer, "State-Sponsored Prayer," Commonweal (July 27, 1962), 417-419.

The second article in "The Forbidden Prayer" by William B. Ball:[9]

[The author stresses that the decision of the Court in the Engle's case must not be taken too narrowly. He believes that the decision forbids all religious activity, not just government composed prayer. The author feels that among the bad effects of the decision is that children will be deprived of a God in their lives. Furthermore, as a result of the decision many Americans will lose their faith in the court. The author also fears that the decision may be misconstrued and interpreted as a denial of the possibility of aid to parochial schools. Finally, the author states that the worst effect of the decision will be to divide the American people.]

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[9] William B. Ball, "The Forbidden Prayer," Commonweal (July 27, 1962), 419-422.

## SUGGESTIONS FOR FURTHER READING

A short but good reading on the role of the Courts with the emphasis on Civil Liberties is Courts and Rights by John P. Roche (Random House, N.Y., 1961). A valuable history of the development of freedom can be found in James T. Shotwell's The Long Way to Freedom (Bobbs-Merrill Co., Indianapolis, 1960).

An excellent collection of leading U.S. Supreme Court cases on the topics included in this study can be found in a book by Milton Konvitz, Bill of Rights Reader (Cornell University Press, Ithaca, N.Y., 1960).* An authoritative but easily read work is The First and The Fifth by John O. Rogge (Thomas Nelson & Sons, N.Y., 1960).

For an account written by a well-known civil liberties lawyer, see Morris Ernst's The First Freedom (MacMillan Co., N.Y., 1964). A survey of freedom of speech and press can be found in William L. Chenery, Freedom of the Press (Harcourt Brace & Co., N.Y., 1955) which also includes sections on movies, radio and television. A very popular and interesting work is The Smut Peddlers (Doubleday & Co., Garden City, N.Y., 1960)* by James J. Kilpatrick which describes the clash between censorship and a free press.

The best short work in the field of freedom of religion is by Leo Pfeffer, Church, State and Freedom (Beacon Press, Boston, 1953).

An excellent presentation of the "absolutist" viewpoint is to be found in William O. Douglas's The Right of the People (Doubleday & Co., Garden City, N.Y., 1958). An analysis of the "balancing" viewpoint is to be found in David Fellman's The Limits of Freedom, (Rutgers University Press, New Brunswick, N.J., 1959).

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*Available in paperback edition.